90-1783

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

v.

PATRICIA A. CHASE,

Respondent.

Petition For A Writ Of Certiorari To The State Of New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner denied its rights under the Fourteenth Amendment by a series of erroneous decisions in an action originating in and litigated through the New York State courts under the standard for review of such decisions set forth in *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917)?

The decision of the trial court simply stated that the petitioner had failed to establish its defense. No reasons were given for this conclusion. The trial court did not base the decision upon, or make any, findings of fact as required by statute. The intermediate appellate court affirmed in an opinion based upon a totally inaccurate view of the issue presented. For a second time, the issues were not addressed. An appeal was taken by petitioner to the New York State Court of Appeals as a matter of right. At the end of the full appellate process, the Court of Appeals issued an opinion stating that it was unable to reach the merits of the appeal. The reason given by the Court of Appeals, on its face, is in express conflict with the statute controlling the resolution of the issues presented on the appeal.

2. Did the arbitrary refusal of the New York Court of Appeals to consider the substance of the petitioner's appeal, taken as a matter of right pursuant to the statutory implementation of the New York State Constitution, as the result of the obvious misreading of a controlling statute, deny petitioner due process and equal protection of the laws?

QUESTIONS PRESENTED FOR REVIEW – Continued

3. Did the refusal of the New York Court of Appeals, upon reargument, to vacate a decision which, on its face, contains an obvious misreading of a controlling statute, deny the petitioner due process and equal protection of the laws?

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OPINIONS BELOW

The opinion of the New York Court of Appeals, dated December 19, 1990, is reported at 76 N.Y.2d 999, 565 N.E.2d 1265 (1990). The opinion is set forth in Appendix A (1).* The opinion of the Court of Appeals denying reargument, dated February 19, 1991, (Appendix I) (36) and the decision of the Court of Appeals dated May 2, 1991 (Appendix M) (45) dismissing, as untimely, a further motion for reargument have not yet been reported. The opinion of the Appellate Division, Fourth Judicial Department is reported at 159 A.D.2d 965 (1990). The opinion is set forth in Appendix B (2). The opinion of the Supreme Court, County of Onondaga is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS

New York Constitution Art. 6 §3

New York Civil Practice Law & Rules §§4213 and 5601

New York Insurance Law §3105(b) and (c)

Rules of New York Court of Appeals §500.11(g)(1), (2) and (3)

The text of these statutes is set forth in Appendix C (6)

* All numerical references are to pages of Petitioners Appendix.

STATEMENT OF THE CASE

This is an action, commenced in the Supreme Court of the State of New York, County of Onondaga, to recover the proceeds of a policy of life insurance. The petitioner (defendant insurer) alleged that the policy was not payable because of material misrepresentations made in the application for the policy which denied any history of the specified medical conditions which were the subject of inquiry.

As hereinafter discussed in detail, at the conclusion of a non-jury trial, the lower court disregarded the statutory requirement of rendering a decision containing findings of fact and merely declared that the petitioner had failed to establish its defense. The intermediate appellate court (the Supreme Court, Appellate Division, Fourth Judicial Department) affirmed. The actual issues on that appeal were never addressed. The decision of the Appellate Division was based upon the analysis of a set of facts not presented by the record. Two justices dissented on questions of law concerning the exclusion of evidence of the underwriting practices which the insurer sought to introduce thus entitling petitioner to an appeal to the New York Court of Appeals as a matter of right pursuant to the New York Constitution as implemented by statute.

The Court of Appeals rendered a decision after full briefing and oral argument stating that the merits of the appeal could not be addressed. As discussed, *infra*, the Court of Appeals based its inability to reach the merits upon a complete misstatement of the concept of material misrepresentation in a decision which misinterpreted a

controlling statute and is plainly erroneous on its face. A motion for reargument was denied.

It is respectfully submitted that the cumulative effect of this series of decisions is "so gross as to be impossible in a rational administration of justice . . . " thereby satisfying the standard for review of state court determinations of state law enunciated by this Court in *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917). Simply stated, petitioner litigated this action through the New York State courts and did not receive one decision which applied the facts of the actual controversy to the applicable law. A total deprivation of due process has resulted in this most unusual situation.

REASONS FOR GRANTING THE WRIT

THE CUMULATIVE EFFECT OF THE DECISIONS OF THE NEW YORK STATE COURTS AND THE REFUSAL OF THE NEW YORK COURT OF APPEALS TO VACATE ITS ERRONEOUS DECISION OF DECEMBER 19, 1990 DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

This Court is not being requested to be an arbiter of issues of state law. The constitutional right to defend when one is assailed in his property, recognized in *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876), was totally absent in any real sense since the decisions below were so demonstrably deficient.

In an action on a life insurance policy the only burden of the beneficiary is to establish the issuance of the contract and the death of the insured. The insurer is then

required to establish the defense of material misrepresentation.

The answer to the complaint alleged that a history of, e.g., chest pain and chronic indigestion was withheld in response to specific questions concerning such conditions set forth in the application for the policy (Appendix D) (10).

Evidence of a history of such medical conditions was introduced at the trial. The testimony and records of the applicant's physician established that he had been given histories of chest pain and chronic indigestion for a period of several months preceding the date of the application (Appendix E) (22).

The concept of a material misrepresentation in an application for insurance is statutory in New York. §3105(b) of the New York Insurance Law provides:

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

§3105(c) states as follows:

> *In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.* (emphasis added) See Appendix C (8).

Thus, an insurer *must and can only* defend such a suit by introducing evidence of the underwriting action which would have followed full disclosure.

The trial justice, however, indicated during the initial testimony of the vice president for underwriting of petitioner that such testimony would, per se, not be considered probative.

> And this would just be a self-serving statement, what would you have done with this application. He would probably say, I would throw it in the waste basket (Appendix F) (23).

A series of evidentiary rulings followed, excluding evidence of the petitioner's underwriting practices, which were the subject of the subsequent appeals.

At the conclusion of a two day trial, the Court rendered an oral decision stating that after hearing the testimony, reviewing the exhibits and the petitioner's trial memorandum "it is the opinion of this Court that the defense has failed to prove a material misrepresentation on behalf of this decedent in this application and therefore judgment for the plaintiff is granted" (Appendix G) (24).

No statement of the facts found by the trial court as the basis for the decision was given. §4213 of the New York Civil Practice Law and Rules requires that the decision of the court "shall state the facts it deems essential". (6).

The Appellate Division affirmed (2). The misrepresentations alleged to have been made concerned specific conditions (chest pain, chronic indigestion) which were the subject of inquiry in the application (10, 12-13). The Appellate Division, however, based its opinion upon the misperception that the application dealt with "general questions" such as an inquiry whether the person seeking insurance believed that he was in good health. The only two cases cited by the Appellate Division majority dealt

with such general inquiries. See, *Bronx Savings Bank v. Weigandt*, 1 N.Y.2d 545, 136 N.E.2d 848 (1956) and *Sommer v. Guardian Life Ins. Co.*, 281 N.Y. 508, 24 N.E.2d 308 (1939). In each of the cited cases the applicants had not been asked, as here, whether they had ever suffered from particular conditions or had experienced specified symptoms. They had merely been requested to give opinions of the state of their health. In such situations it was held that the only duty was to provide a good faith opinion not to submit a medical history.

Under such a misapprehension of the facts, there was no possibility that the issues presented by the exclusion of evidence of underwriting practices concerning the action which would have followed the disclosure of the *specific* medical conditions in question here could have been considered.

Two justices dissented stating that the evidentiary rulings deprived petitioner of the opportunity to present its case (3).

§5601 of the New York Civil Practice Law and Rules provides for an appeal to the Court of Appeals "as of right . . . where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal." See Appendix C (6). Such an appeal was taken by petitioner.

The Court of Appeals rendered a decision on December 19, 1990 following the submission of briefs and oral argument. The full text of the decision is as follows:

> Order affirmed, with costs. There being support in the record, this Court may not disturb the affirmed finding of fact that decedent made no

> material misrepresentation in his application for insurance. It is therefore unnecessary to reach the issue of the trial court's evidentiary rulings pertaining to the separate question of defendant's reliance on the alleged misrepresentations. (1)

The Court of Appeals may only review questions of law. New York Constitution, Art. 6 §3. Appeals concerning the exclusion of evidence raise questions of law reviewable by the Court of Appeals. *Ellison v. New York City Transit Authority*, 63 N.Y.2d 1029, 473 N.E.2d 1171 (1989), *Davidge v. Guardian Trust Co. of New York*, 203 N.Y. 331, 96 N.E. 751 (1911).

The Court of Appeals has declared that it is under a "duty . . . to consider an appeal brought before it as of right." *People v. Pollenz*, 67 N.Y.2d 264, 270, 493 N.E.2d 541 (1986). See also *People Ex. Rel. Feeny v. Bd. of Canvassers*, 156 N.Y. 36, 43, 50 N.E. 425 (1898)-Court of Appeals must decide questions of law presented by appeals.

In its opinion of December 19, 1990, the Court of Appeals stated that there was no need to review the "separate question" of the exclusion of evidence of underwriting practices indicating that such evidence was not relevant to the determination of materiality of misrepresentation. However, the court overlooked the fact that, by statute, the underwriting practices of an insurer are not a separate issue. As previously stated, §3105(b) of the Insurance Law defines a material misrepresentation as a misstatement which "would have led to a refusal by the insurer to make such contract." §3105(c) requires that the insurer be permitted to introduce evidence of its underwriting practices on such issue.

By stating that there was a finding of no "material misrepresentation" the Court of Appeals necessarily determined that there were no misrepresentations which would have led the insurer to decline to issue the policy in question. Such a conclusion cannot stand when the insurer was not permitted to introduce such evidence.

As a result of the misapplication of the statute, petitioner was deprived of its right to be heard on the issues. The constitutional and statutory right of appeal to the Court of Appeals was afforded in form only, not in substance. The New York State Constitution provides that the legislature may determine classes of cases which the Court of Appeals must hear. See, Cohen & Karger, *Powers of the New York Court of Appeals*, §2; Weinstein-Korn-Miller, *New York Civil Practice*, §5601.01. One of these classes is an action in which two justices at the Appellate Division dissented on a question of law. CPLR 5601.

The denial of the right of appeal is particularly egregious under the facts of this case. An appeal is not constitutionally required unless the party seeking to appeal was denied a "full and fair trial on the merits . . . " *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). In the present matter, the rulings of the trial justice prevented the petitioner from introducing the evidence required by statute. In addition, no one will ever know the basis upon which the trial court concluded that the petitioner had failed to establish its defense of material misrepresentation.

A timely motion for reargument was submitted to the Court of Appeals. All of the issues were set forth (Appendix H) (25). The motion was denied in a decision dated February 19, 1991 (Appendix I) (36). A letter was then

sent to the Hon. Sol Wachtler, Chief Judge of the Court of Appeals, requesting further review (Appendix J) (37). In the letter to Chief Judge Wachtler, petitioner argued that the decisions had resulted in a deprivation of due process and equal protection (40). The letter was returned by the Clerk of the Court of Appeals with the statement that a motion for reargument of the denial of the motion would be the proper vehicle for seeking further consideration (Appendix K) (41). Such a motion was submitted on March 7, 1991, well within the 30 day requirement of §500.11(g)(3) of the Rules of the Court of Appeals (Appendix L) (42-43). The motion was dismissed as "untimely" on May 2, 1991. (Appendix M) (45). A letter to the Clerk of the Court concerning this apparent error (Appendix N) (46) did not result in any relief (Appendix O) (48).

A historical analysis demonstrates the gravity of the erroneous interpretation of the statute. The provision that an insurer must introduce evidence of its underwriting practice in order to establish the materiality of a misrepresentation has been statutory in New York since at least 1939 when §149 of the Insurance Law was enacted. The statute was renumbered effective September 1, 1984 without any change. This is a codification of the similar common law rule recognized by the Court of Appeals as early as *1859*. See, *Valton v. The National Fund Life Assurance Co.*, 20 N.Y. 32, 36-37 where, in reliance upon 18th century English precedent, the Court held that it was reversible error to refuse to charge that the plaintiff could not recover upon a policy "if the defendants would not have issued the policy if the representations had not been made."

Since that time the Court of Appeals has consistently recognized that materiality of misrepresentation is established by proof that the policy in question would not have been issued in the absence of a misrepresentation. *Designcraft Jewel Industries v. St. Paul Fire & Marine Ins. Co.*, 46 N.Y. 2d 796, 386 N.E.2d 832 (1978); *DiFilippi v. Equitable Life Assurance Society*, 45 N.E.2d 939, 383 N.E.2d 1155 (1978); *Leamy v. Berkshire Life Ins. Co.*, 39 N.Y.2d 271, 274, 347 N.E.2d 889 (1976); *Vander Veer v. Continental Casualty Co.*, 34 N.Y.2d 50, 312 N.E.2d 156 (1974); *Tolar v. Metropolitan Life Ins. Co.*, 297 N.Y. 441, 446-47, 80 N.E.2d 53 (1948); *Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261, 269, 7 N.E.2d 125 (1937).

In a dissenting opinion in *DiFilippi*, Chief Judge Wachtler expressly recognized that materiality of misrepresentation is to be determined by the sufficiency of the testimony concerning the insurer's underwriting practices. The predecessor of §3105 of the Insurance Law was cited. The facts, not the law, were at issue on that appeal. There has been no change in the statute by the legislature which would permit the Court of Appeals to reach a contrary result. The effective denial of the right of appeal through the persistent refusal to correct the error in the original decision of the Court of Appeals was so arbitrary as to deny equal protection to petitioner. *Lindsey v. Normet, supra*, at 77.

CONCLUSION

The decisions below were so arbitrary and unreasonable as to constitute a complete deprivation of rights guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A

4 No. 262

Patricia A. Chase,

Respondent,

v.

William Penn Life Insurance Company of New York,

Appellant.

DEC 19 1990

Order affirmed, with costs. There being support in the record, this Court may not disturb the affirmed finding of fact that decedent made no material misrepresentation in his application for insurance. It is therefore unnecessary to reach the issue of the trial court's evidentiary rulings pertaining to the separate question of defendant's reliance on the alleged misrepresentations.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

APPENDIX B

* * *

67. (Onondaga Co.) – PATRICIA A. CHASE, RESPONDENT, V WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT. – Order and judgment affirmed with costs. Memorandum: An applicant for life insurance owes a duty to exercise good faith and answer questions regarding the state of his health truthfully. Answers given to the inquiries are to be construed with the greatest liberality in favor of the insured (1A Appleman, Insurance Law and Practice, § 241). When responding to general questions on an insurance application about a medical history, an applicant is not required to list every physical indisposition that he has ever experienced (*ibid*, at 103). Where, as here, an applicant has not been given such information by his doctor, a life insurer cannot require the applicant to answer questions about the past and present condition of his health with the skill of a trained physician (*ibid*, at 129-130). Thus, statements about health are usually considered only opinions of the insured (Bronx Sav. Bank v Weigandt, 1 NY2d 545, 549; Sommer v Guardian Life Ins. Co., 281 NY 508, 514).

Upon our review of the record, we conclude that the trial court, sitting as trier of the fact, properly found that defendant failed to meet its burden of proving a material misrepresentation on behalf of the decedent in his application for insurance. The dissenters' view that the trial court's evidentiary rulings limited defendant's proof is not supported in this record. The record reveals that the court did not preclude introduction of evidence if done in the proper manner. We find no reversible error and a new

trial is not mandated to provide defendant with another opportunity to present its case properly.

All concur, except Pine and Lawton, JJ., who dissent and vote to reverse and grant a new trial, in the following Memorandum: We respectfully dissent. Plaintiff does not question the fact that decedent's application for a life insurance policy contained misrepresentations (as defined by Insurance Law § 3105 [a]), but argues only that the misrepresentations were not proven to be material (*see*, Insurance Law § 3105 [b]). Supreme Court in a similar vein found that there was a lack of proof to sustain defendant's affirmative defense of material misrepresentation. The issue of materiality, however, was not adequately developed at trial because of the court's evidentiary rulings which limited defendant's proof. Consequently, a new trial is required.

Section 3105 (c) of the Insurance Law provides that " . . . evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible". Evidence admissible under section 3105 (c) is not limited to facts which, if known, would have led the insurer to refuse to issue the policy, but rather includes evidence to show that the misrepresentation deprived the insurer of its freedom of choice to accept or reject the risk upon full disclosure of all the facts which might reasonably affect that choice (*see*, Leamy v Berkshire Life Ins. Co., 39 NY2d 271; Vander Veer v Continental Cas. Co., 34 NY2d 50; Geer v Union Mut. Life Ins. Co., 273 NY 261). Likewise, " . . . the question of materiality is not limited to the knowledge that would have been gained by the insurer from disclosure of the particular suppressed fact alone; it extends

to any information that might have been revealed had further inquiry followed the initial disclosure of the suppressed facts (*Anderson v Aetna Life Ins. Co.*, 265 NY 376; *Jenkins v John Hancock Mut. Life Ins., Co.*, 257 NY 289; see *Leamy v Berkshire Life Ins. Co.*, 39 NY2d 271, *supra*; cf. *Massachusetts Mut. Life Ins. Co. v Tate*, 42 NY2d 1046, revg 56 AD2d 173 on dissenting opn of HOPKINS, J.)." (Smirlock Realty Corp. v Title Guar. Co., 70 AD2d 455, 463, *mod* 52 NY2d 179). Further, under Insurance Law § 3105 (b) defendant was entitled to show that "knowledge by the insurer of the facts misrepresented *would have led to a refusal* by the insurer to make such contract [emphasis added]". Hypothetical questions based on information derived from medical testimony, even though this information was not required to be provided in the application, are permissible for such purposes (*see*, Orenstein v Metropolitan Life Ins. Co., 18 AD2d 1016).

In this case, the court admitted evidence with respect to defendant's underwriting practices that established that had decedent truthfully answered the questions, acceptance of the application would have been postponed pending a physical examination by a doctor of the applicant's own choosing. In this case a physical was, in fact, conducted very shortly after the application was signed. The issue then for determination became whether the information disclosed at this subsequent examination, if known by defendant, would have deterred defendant from issuing the policy in question. Supreme Court, however, consistently excluded evidence which allegedly would have shown that, if defendant had been provided these facts, it would not have issued the policy. In this

regard, the record establishes that Supreme Court repeatedly sustained objections based on the grounds of relevancy, which precluded the underwriter from testifying to the effect the information derived from plaintiff's physical examination would have had on the decision to issue the policy. By way of example, although plaintiff's physician testified that plaintiff stated he consumed a pint of alcohol daily, and although the doctor concluded that plaintiff's heart burn condition that had existed for four or five months was related to alcohol consumption, the court refused to permit the underwriter to answer questions regarding what action the company would have taken "if the applicant submitted a report from his MD, indicating that alcohol consumption was a cause of the heart burn" and "if the applicant submitted a report from his MD . . . that the applicant was then drinking one pint of alcohol a day". This was error (*see*, Insurance Law § 3105 [b], [c]; Leamy v Berkshire Life Ins., Co., *supra*; Smirlock Realty Corp. v Title Guar. Co., *supra*). A new trial is therefore required to provide defendant an opportunity to present this evidence. (Appeal from Order and Judgment of Supreme Court, Onondaga County, Miller, J. – Recover Life Insurance Proceeds.) PRESENT: CALLAHAN, J.P., DOERR, GREEN, PINE, LAWTON, JJ.

* * *

APPENDIX C

CIVIL PRACTICE LAW & RULES
NEW YORK CIVIL PRACTICE - CPLR

CPLR

§ 5601. Appeals to the court of appeals as of right

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

* * *

CIVIL PRACTICE LAW & RULES
TRIAL BY THE COURT

CPLR

§ 4213. Decision of the court.

* * *

(b) Form of decision. The decision of the court may be oral or in writing and shall state the facts it deems essential. In a medical, dental or podiatric malpractice action or in an action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both, as such terms are defined in subdivision (b) of section forty-five hundred forty-five, for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, and in any other action brought to

recover damages for personal injury, injury to property, or wrongful death, a decision awarding damages shall specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In a medical, dental or podiatric malpractice action, and, in any other action brought to recover damages for personal injury, injury to property, or wrongful death, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the decision and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the court shall set for the period of years over which such amounts are intended to provide compensation. In computing said damages, the court shall award the full amount of future damages, as calculated, without reduction to present value.

* * *

§ 3105. Representations by the insured

* * *

(b) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

(c) In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.

* * *

Rule 500.11 Motions

(g) *Reargument of appeals and motions.* (1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

(2) On reargument of motions, a single brief or memorandum may be filed if that was the requirement on the original motion.

(3) The motion may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons. Unless otherwise permitted by the court, the notice of motion shall be served not later than 30 days after the appeal or motion has been decided. Proof of service of three copies of the moving papers on each other party is required.

* * *

NEW YORK CONSTITUTION

Art. 6, § 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

* * *

APPENDIX D

* * *

	YES	NO
5. HAS ANY PERSON PROPOSED FOR INSURANCE EVER HAD:		
a. convulsions, paralysis, neuritis, nervous breakdown, dizziness, fainting spells, migraine headaches, nervous or mental disorder?	___	X
b. high blood pressure, chest pain, shortness of breath, palpitation, heart attack, disorder of heart or blood vessels?	___	X
c. hemorrhage, chronic hoarseness or cough, asthma, tuberculosis, spitting of blood, emphysema, disorder of respiratory system?	___	X
d. chronic indigestion, ulcer, hernia, colitis, intestinal bleeding, disorder of stomach, gall bladder, liver, digestive or abdominal organs?	___	X
e. kidney stone, diabetes, sugar, albumin, pus, or blood in urine, disorder of kidneys, bladder, genito-urinary organs?	___	X
f. rheumatic, fever, arthritis, gout, disorder of muscles, bones, joints or spine?	___	X
g. impairment of vision or hearing or disease of eyes, ears, nose or throat?	___	X
h. tumor, cancer, venereal disease, disorder of blood, skin, thyroid or other glands?	___	X
i. treatment or observation in any hospital or institution? (past 5 years)	___	X

j. X-rays, electrocardiograms, blood studies or other diagnostic tests (past 5 years). When, why, by whom, with what results? ___ X

k. treatment or consultations with any physicians or practitioners, other than as stated above (past 5 years). Give details. ___ X

6. Have you in the past 5 years been advised to have or do you contemplate a surgical operation? ___ X

7. Is any person proposed for insurance now pregnant? (If so, how many months.) ___ X

* * *

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

_____X

PATRICIA A. CHASE,

Plaintiff,

-against-

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

_____X

ANSWER
Index No.

Defendant, as its answer to the plaintiff's complaint:

1. Denies knowledge or information sufficient to form a belief concerning the allegations contained in paragraphs 1 and 8.

2. Denies knowledge or information sufficient to form a belief concerning the allegations contained in paragraphs 5 and 6 except admits that John H. Chase filed an application for the specified policy, dated December 15, 1986, with defendant's general agent, Murray & Zuckerman Inc. and paid the first quarter premium.

3. Denies the allegations contained in paragraph 7 except admits the delivery of the subject policy in March, 1987 in consideration of the truth of the statements contained in the application and the payment of the premium.

4. Denies the allegations contained in paragraphs 10 and 12 except admits the timely submission of a claim in proper form for the proceeds of the subject policy and a refusal to pay.

5. Denies the allegations contained in paragraph 9.

AS A FIRST AFFIRMATIVE DEFENSE

6. As the result of the application of John H. Chase to William Penn, a policy of life insurance (192404) was issued.

7. In said application, Mr. Chase made certain representations, statements and answers to questions concerning himself as a proposed insured.

8. Question 5b of Part 11 of the application inquired as follows:

> "HAS ANY PERSON PROPOSED FOR INSURANCE EVER HAD: high blood pressure, chest pain, shortness of breath, palpitation, heart attack, disorder of heart or blood vessels?"

9. The answer given to this question by the applicant was "No".

10. Question 5c of Part 11 of the application inquired as follows:

> "HAS ANY PERSON PROPOSED FOR INSURANCE EVER HAD: hemorrhage, chronic hoarseness or cough, asthma, tuberculosis, spitting of blood, emphysema, disorder of respiratory system?"

11. The answer given to this question by the applicant was "No".

12. Question 5d of Part 11 of the application inquired as follows:

> "HAS ANY PERSON PROPOSED FOR INSURANCE EVER HAD: chronic indigestion, ulcer, hernia, colitis, intestinal bleeding, disorder of stomach, gall bladder, liver, digestive or abdominal organs?"

13. The answer given to this question by the applicant was "No".

14. Question 5e of Part 11 of the application inquired as follows:

> "HAS ANY PERSON PROPOSED FOR INSURANCE EVER HAD: kidney stone, diabetes, sugar, albumin, pus, or blood in urine, disorder of kidneys, bladder, genito-urinary organs?"

15. The answer given to this question by the applicant was "No".

16. In Part 11 of the application, Mr. Chase represented and agreed as follows:

"I have carefully read all the above questions; statements and answers are true to the best of my knowledge and belief."

17. The representations, statements and answers to the aforesaid questions were false and untrue.

18. Prior to the application, Mr. Chase had chest pain.

19. Prior to the application, Mr. Chase had palpitations.

20. Prior to the application, Mr. Chase had spitting of blood.

21. Prior to the application, Mr. Chase had disorder of respiratory system.

22. Prior to the application, Mr. Chase had chronic indigestion.

23. Prior to the application, Mr. Chase had disorder of stomach.

24. Prior to the application, Mr. Chase had disorder of liver.

25. Prior to the application, Mr. Chase had disorder of digestive or abdominal organs.

26. Prior to the application, Mr. Chase had disorder of kidneys, bladder, genito-urinary organs.

27. In preparing, issuing and delivering the said policy of insurance, William Penn relied upon the truth of said representations, statements and answers to questions contained in the application and said representations, statements and answers were material.

28. If the representations, statements and answers to the aforesaid questions had been truthfully and accurately given, this policy would not have been issued.

29. William Penn has no adequate remedy at law.

AS A SECOND AFFIRMATIVE DEFENSE

30. Defendant repeats and realleges the allegations contained in paragraphs 6 through 29.

31. In Part I of the application for the subject policy, dated December 15, 1986, the parties agreed as follows:

> "Except as may be provided in a duly issued Conditional Receipt bearing the same number as this application, no insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability represented in Parts 1 and 11 of this application."

32. Upon information and belief, Mr. John H. Chase issued a Conditional Receipt to himself as applicant at the time of the delivery of the application to defendant and the payment of the premium.

33. The Conditional Receipt provided in part as follows:

> "all Proposed Insureds must be on the Effective Date, as defined below, risks acceptable to the Company under its rules, limits and standards on the plan and for the amount applied for without modification and at the rate of premium paid with the application."

34. At the time of the application, Mr. Chase was not a "risk acceptable to the Company under its rules, limits and standards on the plan and for the amount applied for without modification and at the rate of premium paid with the application."

35. As the result of the failure of this condition precedent, no insurance became effective prior to the delivery of the subject policy in March, 1987.

AS A THIRD AFFIRMATIVE DEFENSE

36. Defendant repeats and realleges the allegations contained in paragraphs 30 through 35.

37. At the time of the delivery of the policy in March, 1987, Mr. Chase was not in the state of health and insurability represented in the application.

38. As the result of the failure of this condition precedent, the subject policy was ineffective at delivery.

WHEREFORE, defendant, William Penn Life Insurance Company of New York, demands judgment:

(a) dismissing the plaintiff's complaint.

(b) that policy 192404 be cancelled and rescinded and that plaintiff be directed to surrender said policy.

(c) for such further and different relief as to the Court may seem just and proper.

Dated: White Plains, New York
April 18, 1988

BLEAKLEY & SCHMIDT
Attorneys for Defendant
Office & P.O. Address
123 Main Street
White Plains, New York 10601
Tele: (914) 949-2700

TO: GREEN AND REID
Attorneys for Plaintiff
Office & P.O. Address
472 South Salina Street
Suite 600
Syracuse, New York 13202
Tele: (315) 475-8189

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

_____

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification	in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.
☐ Corporate Verification	the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on ,19

STATE OF NEW YORK, COUNTY OF

(Print signer's name below signature)

ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service By Mail	by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:
☐ Personal Service	by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

(Print signer's name below signature)

Sir:

Please take notice, that the within is a true copy of duly made and entered in the within entitled and filed in the Office of the Clerk of on the day of 19 .

Dated, White Plans, N.Y.

_____19 .

Yours, etc.
Bleakley & Schmidt

ATTORNEYS FOR

123 MAIN STREET
WHITE PLAINS, N.Y. 10601-3104
914-949-2700

To _____ Esq.

Attorney for _____

COUNTY CLERK'S INDEX

No. _____

SUPREME COURT STATE OF NEW YORK
COUNTY OF ONONDAGA

PATRICIA CHASE

PLAINTIFF,

-AGAINST-

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

DEFENDANT.

COPY

ANSWER

BLEAKLEY & SCHMIDT

ATTORNEYS FOR

Defendant

123 MAIN STREET
WHITE PLAINS, N. Y. 10601-3104
914-949-2700

DUE AND TIMELY SERVICE OF A COPY OF THE WITHIN IS HEREBY ADMITTED.

DATED, WHITE PLAINS, N. Y. 19

ATTORNEY FOR

Sir:

Please take notice, that the within
will be presented for settlement and signature herein to the Hon.
one of the Justices of the within named Court, in the New York on the day of
19 , at M

Dated, White Plains, N.Y.

_____19 .

Yours, etc.

Bleakley & Schmidt

ATTORNEYS FOR

123 MAIN STREET
WHITE PLAINS, N. Y. 10601-3104

To _____ Esq.

Attorney for _____

John Chase
12/19/86

WNL

Exam

Yoga

Pt is for M. Baron if seen WNL in
10 yrs. wgt ↑ → 200 lbs - was 160's 15 yrs ago.
no real complaints exc - occ abd pain,
Arm weigh → equates ⊕ physical activity
⊕ Fluid retention In general feels well

Cigs - 1½ ppd

ETOH - used to beer
now - 1 pint/d

coffee 3/d.
meds - none/occ
allergy - ∅

— ⊖ light-headedness, 1 LOC many yrs ago when diving

- CV - occ CP - upper chest SS, worse if lying flat.
⊕ HB. ⊖ SOB if pain, non-exertional
⊕ palp - x 10-15 yrs - only if exertion

- Pulm - Breathing good ⊕ Arm cough → green mucous
⊕ blood - felt to be from nose/sinuses.
⊖ allergy.

- GI - Appetite ⊖ ⊖ dysphagia; ⊕ HB ↑ in Amt.
x 4-5 mos (q d) related to ETOH ⊕ N/V 1x/wk usually
PC. no blood in coffee grounds.
Bowels - good. ⊖ BRB melena; ⊖ light stool.

- GU - ↓ U.O. ⊖ dysuria, hesitancy - urine concentrated

- Skin - ∅
- N-S - ∅

Ext - ⊕ edema in ankles.
hands & feet cold all the time

APPENDIX F

167
Trial Transcript

* * *

Rudy – direct

[p. 160] testified that Mr. Chase related it to drinking and eating.

THE COURT: No. It was his own opinion that these could be from drinking and eating.

MR. MEADE: Yes. But, that.

THE COURT: He didn't relate it as I gathered anyway, let's pass that for a moment. And we will pass 3101D. I don't think Mr. McCrone you have heard the very last part when it came to the end of the assumption and then the question. I don't think you heard it, I barely heard it. If you heard it you have got very good ears. Read that last part of that question and then we will go from there.

(Last question read back.)

MR. MCCRONE: I am thinking. Judge, I still feel that the assumption, the hypothetical.

THE COURT: Now we are coming down to an expert. Expert person called. He may have been a vice-president or an employee at least of William Penn. And this would just be a self-serving statement, what would you have done with this application. He would probably say, I would throw it in the waste basket.

* * *

APPENDIX G

286
Trial Transcript

[p. 286] P. Chase – direct

THE COURT: Very well. And this involves the application and issuance of a life insurance policy involving her late husband John Chase.

Now I am going to be very brief, I am going to say this, that after hearing all the testimony, on behalf of the defendants in regard to their affirmative defenses, and receiving all the proof here, and after noting that the witness' doctor, Victor Croglio, testified and – I want this clear on the record as to the Court's impression, in a direct and forthright manner – that after considering all of his testimony, after reading the brief that's been submitted to me by the defense counsel, and all the witnesses, sworn by the parties, and after examining the exhibits to some degree as they were submitted to the Court, it is the opinion of this Court that the defense has failed to prove a material misrepresentation on behalf of this decedent in this application and therefore judgment for the plaintiff is granted. And you may have an exception.

MR. MEADE: Thank you.

THE COURT: You may have an exception. I am sure you will take it from there.

* * *

APPENDIX H

COURT OF APPEALS

STATE OF NEW YORK

PATRICIA A. CHASE,

Plaintiff-Respondent,

against

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellant.

Notice of Motion and Memorandum in Support of Motion for Reargument

---

BLEAKLEY, PLATT & SCHMIDT
Attorneys for Defendant-Appellant
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602-5056
(914) 949-2700

Dated: January 8, 1991

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COURT OF APPEALS
OF THE STATE OF NEW YORK
----------X

PATRICIA A. CHASE,

Plaintiff-Respondent,

– against –

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellant.

NOTICE OF MOTION FOR REARGUMENT

----------X

Upon the annexed Memorandum and the papers submitted by the Defendant-Appellant in support of its appeal from the order of the Appellate Division entered March 16, 1990, the Defendant-Appellant will move this Court at the Court of Appeals Hall, located at Eagle Street, Albany, New York, 12207 on January 28, 1991 at 9:30 a.m. for reargument of the decision dated December 19, 1990 upon the ground that controlling principles of law were overlooked or misapprehended by the Court together with such further and different relief as to this Court may seem just and proper.

Dated: White Plains, New York
January 8, 1991

BLEAKLEY PLATT & SCHMIDT
ATTORNEYS FOR DEFENDANT-APPELLANT
OFFICE & P.O. ADDRESS
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602-5056
(914) 949-2700

TO: WEISSMAN & KINGSLEY
ATTORNEYS FOR PLAINTIFF-RESPONDENT
OFFICE & P.O. ADDRESS
200 Salina Meadows Parkway
Syracuse, New York 13212
(315) 457-9159

COURT OF APPEALS
OF THE STATE OF NEW YORK

----------X

PATRICIA A. CHASE,

Plaintiff-Respondent,

– against –

WILLIAM PENN LIFE
INSURANCE COMPANY
OF NEW YORK,

Defendant-Appellant.

----------X

MEMORANDUM IN SUPPORT OF MOTION TO REARGUE APPEAL

The decision of the Court of Appeals dated December 18, 1990, is based upon the incorrect premise that there was an affirmed finding of fact on an issue separate and distinct from the issue to which the excluded evidence pertained and sufficient to support a finding for the respondent and thus it was unnecessary to review the matters presented by the appellant. A copy of the decision is annexed to this memorandum.

This Court stated that the "affirmed finding of fact that decedent made no material misrepresentation in his application for insurance" made it "unnecessary to reach

the issue of the trial court's evidentiary rulings pertaining to the separate question of defendant's reliance on the alleged misrepresentations."

The "defendant's reliance" is an integral part of the concept of material misrepresentation and is not a "separate question." By statute the determination of whether an insurer relied upon a misrepresentation is a primary consideration on the issue of whether a material misrepresentation was made. There was no affirmed finding of fact on a separate issue which would preclude this Court from reviewing the questions presented by the appellant. The evidence excluded by the trial court was offered in support of the defense of material misrepresentation. *See* pages 8-19 of the appellant's brief. It is respectfully submitted that this Court cannot properly review the issue of materiality without a consideration of the propriety of the evidentiary rulings.

There was no affirmed finding that the applicant did not make a misrepresentation. An erroneous a belief as to the existence of such a finding appears to be implicit in the decision. Material misrepresentation and misrepresentation are completely different concepts. *Leamy v. Berkshire Life Ins. Co.*, 39 N.Y.2d 271, 274 (1976).

By statute "(a) misrepresentation is a false representation." Insurance Law §3105(a).

§3105(b) of the Insurance Law provides:

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts

> misrepresented would have led to a refusal by the insurer to make such contract.
>
> § 3105(c) states:
>
> In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.

The provisions of Insurance Law §§3105(b) and (c) were set forth on page 9 of the appellant's brief. The "practice of the insurer" (reliance) cannot be separated from the concept of material misrepresentation.

The elements of actionable fraud are not applicable to a material misrepresentation in an insurance context. A false representation of a material fact, intentionally made, upon which a person relied to his detriment must be established to recover for common law fraud. 60 *New York Jurisprudence 2d,* Fraud & Deceit §11. In cases involving the defense of material misrepresentation, there is no need to establish the elements of fraud. Any misstatement which induces the issuance of a policy which might otherwise not have been delivered is material even if "made innocently and without any feature of fraud . . . " *Eastern District Piece Dye Works, Inc. v. The Travelers Insurance Company,* 234 N.Y. 441, 449-50 (1923). It would be redundant to state that an insurer relied upon a material misrepresentation since the latter finding necessarily includes a finding of reliance under Insurance Law §3105(c).

The oral decision of the trial court (Justice Donald H. Miller) is at page 286 of the record on appeal. Justice Miller stated in a conclusory manner that after hearing

the testimony and reviewing the exhibits and the defendant's brief, " . . . it is the opinion of this Court that the defense has failed to prove a *material misrepresentation* on behalf of this decedent in this application and therefore judgment for the plaintiff is granted" (emphasis added).

Justice Miller did not state that William Penn failed to prove a misrepresentation and there would be no support in the record for such a finding. Mr. Chase failed to disclose a history of chest pain, palpitations, chronic indigestion, disorder of stomach, digestive or abdominal organs in response to specific questions in his application (307). As stated on page 3 of the appellant's brief, the history of chest pain and palpitations was established through the testimony of the physician with whom Mr. Chase consulted four days after submitting the insurance application. It was undisputed that the chest pain had been present for several months and the palpitations for many years.

There was also a specific question on the application concerning "chronic indigestion" (307). The fact that the gastric symptoms experienced by Mr. Chase during the months preceding the application constituted indigestion was not in dispute. The plaintiff's physician testified without contradiction that indigestion is a "generic term for stomach upset, usually related to eating" and would include heartburn, nausea and vomiting, the conditions present for months preceding the submission of the application. *See* page 3 of the appellant's brief. As discussed on pages 2 and 3 of appellant's reply brief, the gastric conditions had persisted for more than a sufficient period to be classified as chronic.

The Appellate Division affirmed the finding of Justice Miller that "defendant failed to meet its burden of proving a *"material misrepresentation . . . "* (380) (emphasis added).

The reference of Justice Miller to William Penn's trial memorandum, as one of the things considered by him in rendering the decision, is very significant (286). William Penn's defense was that the misrepresentations were material because disclosure of the conditions would have led to a postponement and medical investigation. The authority cited on pages 10, 20-22 of the appellant's brief on this issue was submitted to Justice Miller. As stated on page 16 of the appellant's brief, Justice Miller made several statements indicating that he believed that testimony by an underwriter concerning the practices of the company was "self serving" ("He [the underwriter] would probably say, I would throw it [the application] in the waste basket") and speculative. Justice Miller clearly rejected the legal concept of establishing materiality in accordance with the requirements of §3105 of the Insurance Law.

Issues concerning the exclusion of evidence can be reviewed by the Court of Appeals when the evidence was relevant to the propriety of the determination of an affirmed finding of fact. *Ellison v. New York City Transit Authority,* 63 N.Y.2d 1029 (1984). The exclusion of evidence presents a question of law. *Davidge v. Guardian Trust Company of New York,* 203 N.Y. 331 (1911).

This is not a situation where a right of appeal exists but the issues presented are beyond the power of this Court to review.

In the first paragraph of its decision the Appellate Division majority made several statements which, despite the express affirmance of the finding of no material misrepresentation, may be argued to be an indication of an underlying perception that no misrepresentation was made in the application. Since the trial court made no findings of fact, any factual finding by the Appellate division on an affirmance would be subject to review. *Bernardine v. City of New York*, 294 N.Y. 361 (1945). There must be one appellate review of the facts. Cohen & Karger, *Powers of the New York Court of Appeals*, §110, pages 469-70.

Any predicate for any such possible implicit finding would have been erroneous.

The statements in the first paragraph of the decision of the Appellate Division, which immediately precede their affirmance of the conclusion of the trial court that the defendant failed to establish a material misrepresentation, deal with principles which are irrelevant to any issue presented in this action. The Appellate Division majority stated that "(w)hen responding to general questions on an insurance application about a medical history, an applicant is not required to list every physical indisposition that he has ever experienced" citing 1A Appleman, *Insurance Law & Practice*, §241, page 103 (380). The authority given for this case in *Appleman* is the opinion of the Supreme Court of Idaho in *Wardle v. International Health & Life Ins. Co.*, 551 P.2d 623 which relied upon *Dean v. Nationwide Life Ins. Co.*, 536 P.2d 1122 (Supreme Court of Idaho, 1975) for this statement. The facts of *Wardle* show it to have no applicability to this action.

The issue in *Wardle* was whether occasional chest pain, previously experienced by an insured, was an "other disorder" in a question inquiring whether the insured had any "disease, disability or other physical or mental disorder" in addition to the specific conditions inquired about in preceding questions. There was no specific inquiry whether the insured had every experienced chest pain. The Court held that disclosure was not warranted since the chest pain "had been intensively investigated by physicians and he had been subject to a battery of medical tests. Nothing abnormal had been discovered." There was no basis for classifying the past symptom as a disorder. Mr. Chase applied for the policy immediately before seeking medical assistance. As discussed on page 4 of the appellant's brief, many significant abnormal findings resulted. Unlike, *Wardle*, the present application contained a specific question concerning chest pain.

William Penn does not rely upon any general questions. Each condition misrepresented was the subject of specific inquiry in the application.

The two Court of Appeals cases cited by the Appellate Division (*Sommer v. Guardian Life Ins. Co. & Bronx Savings Bank v. Weigandt*) each dealt with similar *general* questions (are you in sound health or good health) and are totally inapplicable to the insureds [sic] failure to answer questions concerning specific conditions.

Omitted from the Appellate Division's statement that an applicant is not required to answer questions with the "skill of a trained physician" is the remainder of the

quotation from Appleman "or disclose information concerning his health which is beyond the ken of an ordinary layman."

Four days after he completed the insurance application Mr. Chase informed his physician, Dr. Victor Croglio, about the history of chest pain, heartburn, nausea and vomiting. This was not a situation where an unknown and unsuspected condition was first diagnosed after an insurance application. The application inquired about the specific symptoms which Mr. Chase had been knowingly experiencing for at least several months. See pages 1-5 of the appellant's brief.

There is nothing in the record to support a contention that Mr. Chase did not misrepresent the state of his health in the application for the subject policy.

It is respectfully submitted that the decision of this Court should be vacated and the appeal determined on the merits.

CONCLUSION

THE RELIEF SOUGHT BY THE APPELLANT SHOULD BE GRANTED.

Respectfully submitted,

BLEAKLEY PLATT & SCHMIDT
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APPENDIX I

Mo. No. 100

Patricia A. Chase,

Respondent,

v.

William Penn Life Insurance Company of New York,

Appellant.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

FEBRUARY 19, 1991

APPENDIX J

BLEAKLEY PLATT & SCHMIDT
ONE NORTH LEXINGTON AVENUE
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WHITE PLAINS, N.Y. 10602-5056
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FACSIMILE (914) 683-6956

February 22, 1991

VIA FEDERAL EXPRESS

Hon. Sol Wachtler
Chief Judge
Court of Appeals
Eagle Street
Albany, New York 12207

Re: *Chase v. William Penn Life Insurance Company of New York*

Dear Judge Wachtler:

We represent the defendant-appellant in this action. The decision of the Court of Appeals determining the subject appeal appears to have resulted from the failure to consider, or the misreading of, a controlling statute. The Court has denied defendants's [sic] motion for reargument compelling me to appeal to you to review the situation and permit the defendant to submit another motion for reargument so that a demonstrable error of law which has, in effect, deprived the defendant of its right of appeal may be corrected. A copy of the motion for reargument and decision upon reargument are enclosed.

This is an action to recover the proceeds of a policy of life insurance. Material misrepresentation in the application for the policy is the defense. The action was tried

before the Court (Justice Donald Miller, Supreme Court, Onondaga County) without a jury. Justice Miller did not render a written decision. In a brief statement following the conclusion of the testimony, he declared that judgment was granted for the plaintiff since "it is the opinion of this Court that the defense has failed to prove a material misrepresentation on behalf of this decedent in this application . . . "

The Appellate Division affirmed. Two dissenting justices stated that erroneous evidentiary rulings of the trial court deprived the defendant of the opportunity to establish its defense.

Defendant's detailed jurisdictional statement indicating that rulings regarding the admissibility of evidence presented questions of law, reviewable by this Court, was thereafter accepted. The plaintiff did not contend otherwise. The appeal was briefed and argued on the merits. No issue of the non-reviewability of the evidentiary rulings was ever raised.

In its decision, the Court stated that the *"separate question"* of the evidentiary rulings could not be reached since there was an "affirmed finding of fact that decedent made no material misrepresentation . . . " The decision appears to be similar to cases such as *Donigi v. American Cyanamid Company,* 45 N.Y.2d 935 which were based upon the appealable but not reviewable distinction which prevailed under former practice in cases where a dissent at the Appellate Division was on a question of fact. This is most certainly not the present situation.

The evidentiary rulings on the subject appeal pertained to the exclusion of testimony concerning the

underwriting practices of William Penn. *This subject could not be classified as a "separate question" from the issue of material misrepresentation since by statute the underwriting practices of the insurer must be considered by the Court in deciding whether a material misrepresentation has been established. See,* § 3105(c) of the Insurance Law – "In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible." This is not to say that such testimony is per se admissible or probative but as the dissenting justices at the Appellate Division reasoned, the issues in this action cannot be properly addressed without a consideration of whether the rulings of the trial court were proper. It is illogical to conclude that the exclusion of evidence concerning an issue is irrelevant to the determination of whether that issue was correctly resolved. It would be the equivalent of determining in a will contest that the exclusion of evidence of undue influence could not be considered in view of an affirmed finding of due execution.

As I hope was adequately stated in our motion for reargument, this decision appears to be based upon an erroneous belief that the elements of fraud must be established to prove a material misrepresentation. The decision states that if there was no "material misrepresentation" the issue of what action would have been taken by the insurer is irrelevant. It is submitted that the Court believed that by so indicating it was acknowledging an affirmed finding of no misstatement by the applicant. This, however, was never found by either lower court. The presence of "material" imports the underwriting considerations and fixes the meaning of the concept.

As stated in the memorandum in support of the motion for reargument, issues concerning the exclusion of evidence offered on an issue which was determined by a finding of fact present a question of law for the Court of Appeals. *Ellison v. New York City Transit Authority*, 63 N.Y.2d 1029. In *Tate v. Colabello*, 58 N.Y.2d 84, 86 this Court observed that while issues of fact may not be considered, "errors of law properly preserved during the course of trial nevertheless may be reviewed." It is respectfully submitted that this is precisely the present situation. Separating the issue of underwriting practice from the concept of a material misrepresentation results in a dramatic change in the concept which, although infrequently at issue in the appellate courts, has been codified since at least 1939. *See*, L. 1939, c. 882 § 149(3).

The propriety and admissibility of the testimony of an underwriter is a major issue in many trials and the decision of this Court could seriously affect the reception of such evidence.

I sincerely believe that the decisions have resulted in an unintended but very real deprivation of due process and equal protection and again request that you review this situation and permit another motion for reargument.

Thank you for your consideration.

Respectfully submitted,

/s/ Robert D. Meade
ROBERT D. MEADE

RDM/mb
Enclosure
cc: Weissman & Kingsley, Esqs.

APPENDIX K

State Of New York

(SEAL)

Court Of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

February 26, 1991

Robert D. Meade, Esq.
Bleakley Platt & Schmidt, Esqs.
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602-5056

Re: *Chase v. William Penn Life Insurance Company of New York*

Dear Mr. Meade:

Your February 22, 1991 letter with attachment addressed to Chief Judge Sol Wachtler has been referred to me for a reply.

If you wish to move for reargument of this Court's February 19, 1991 decision, which denied your prior reargument motion, you must comply with section 500.11(g) of the Court's Rules of Practice. A letter directed to an individual Judge of this Court cannot be filed in lieu of a properly conforming submission. Accordingly, I am constrained to return your papers.

Very truly yours,

/s/ Donald M. Sheraw
Donald M. Sheraw

SA:jh
Enc.

cc: Weissman & Kingsley, Esqs.

APPENDIX L

COURT OF APPEALS
OF THE STATE OF NEW YORK

- -X

PATRICIA A. CHASE,

Plaintiff-Respondent,

-against-

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellant.

- -X

NOTICE OF MOTION FOR REARGUMENT

Upon the annexed Memorandum and the papers submitted by the Defendant-Appellant in support of its appeal from the order of the Appellate Division entered March 16, 1990, the Defendant-Appellant will move this Court at the Court of Appeals Hall, located at Eagle Street, Albany, New York, 12202 on March 18, 1991 at 9:30 a.m. for reargument of the decision dated February 19, 1991 which denied reargument of the decision dated December 19, 1990 upon the ground that controlling principles of law were overlooked or misapprehended by the Court together with such further and different relief as to this Court may seem just and proper.

Dated: White Plains, New York
March 5, 1991

BLEAKLEY PLATT & SCHMIDT
ATTORNEYS FOR DEFENDANT-APPELLANT
OFFICE & P.O. ADDRESS
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602-5056
(914) 949-2700

TO: WEISSMAN & KINGSLEY
ATTORNEYS FOR PLAINTIFF-RESPONDENT
OFFICE & P.O. ADDRESS
200 Salina Meadows Parkway
Syracuse, New York 13212
(315) 457-9159

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Martin McDermott, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 119 Post Avenue New York, NY 10034

That on March 7, 1991, he served the annexed (3) Notice of Motion and Memorandum in Support of Motion for Reargument

Express Mail in Chase v. William Penn Life Insurance

upon

Weisman & Kingsley
Attorneys at Law
200 Salina Meadows Parkway
Syracuse, NY 13212

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in the Post Office regularly maintained by the United States Postal Service at 90 Church Street, Borough of Manhattan, City of New York, addressed as above shown.

Express Mail /s/ Martin M. Dermott

Sworn to before me this

7th day of March, 1991

/s/ James F. Coonan
JAMES F. COONAN
NOTARY PUBLIC State of NY
Residing in New York County
My commission expires July 25, 1992
Registration No. 4938738

APPENDIX M

Mo. No. 329

Patricia A. Chase,

Respondent,

v.

William Penn Life Insurance Company of New York,

Appellant.

Motion for reargument dismissed as untimely with one hundred dollars costs and necessary reproduction disbursements.

MAY 2, 1991

APPENDIX N

BLEAKLEY PLATT & SCHMIDT
ONE NORTH LEXINGTON AVENUE
P.O. BOX 5056
WHITE PLAINS, N.Y. 10602-5056
(914) 949-2700
FACSIMILE (914) 683-6956

May 6, 1991

VIA FEDERAL EXPRESS

Donald M. Sheraw, Esq.
Chief Clerk
State of New York
Court of Appeals
Albany, New York 12207

Re: *Chase vs. William Penn Life Insurance Company of New York*

Dear Mr. Sheraw:

This firm represents the defendant-appellant. Enclosed please find a copy of the decision of the Court of Appeals, dated May 2, 1991, dismissing as "untimely" appellant's motion to reargue the decision of this Court dated February 19, 1991. A copy of the decision, dated February 19, 1991 is also enclosed. The February 19 decision denied a motion to reargue a decision dated December 19, 1990 which affirmed an order of the Appellate Division.

The motion to reargue was made well within the 30 days required by Rule 500.11(g)(3). As indicated in the enclosed affidavit of service, the motion was served on March 7, 1991.

The basis for the motions for reargument is that the Court misapplied a fundamental principle of insurance

law in the initial decision as the result of the misreading of a statute. Under these circumstances, a decision of this nature upon reargument is very disturbing. Is it possible that the individual who reviewed the second motion for reargument believed that the motion pertained to the original decision of December 19, 1990?

Your review of the situation is urgently requested.

Very truly yours,

/s/ Robert D. Meade
ROBERT D. MEADE

RDM/mb
cc: Weisman & Kingsley
(Via Facsimile and Regular Mail)

APPENDIX O

State of New York

Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

May 7, 1991

Robert D. Meade, Esq.
Bleakley Platt & Schmidt, Esqs.
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602-5056

Re: *Chase v. William Penn Life Insurance Company of NY*

Dear Mr. Meade:

This acknowledges receipt of your letter of May 6, 1991 and enclosures.

The Court's determination of dismissal which was handed down on May 2, 1991 was made after full Court review of the papers submitted on the motion. Unfortunately, I cannot answer the question you pose. In motion matters, as in appeals, the decisions and orders of the Court must speak for themselves without administrative elaboration or interpretation.

Insofar as my letter of February 26, 1991 may have been read to suggest that the contemplated reargument motion could or could not be timely taken, such a reading

was not suggested or intended and, in any event, would not be binding on the Court.

Very truly yours,

/s/ Donald M. Sheraw
Donald M. Sheraw

SA:jh

cc: Weisman & Kingsley, Esqs.